

Status Conference

10/3/2011

[1]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

BRIGHAM YOUNG UNIVERSITY and
DR. DANIEL L. SIMMONS,

Plaintiffs,

Vs.

Case No: 2:06-cv-890 TS BCW

PFIZER, INC., et al.,

Defendants.

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THE HONORABLE BROOKE WELLS

STATUS CONFERENCE

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TAKEN AT: Federal Court
350 S. Main Street
Salt Lake City, Utah

DATE: October 3, 2011

TIME: 2:30 p.m.

REPORTED BY: Kellie Peterson, RPR

[2]

A P P E A R A N C E S

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P R O C E E D I N G S

THE COURT: Good morning. All right, we are here for a status conference, in Brigham Young University and Dr. Daniel Simmons versus Pfizer, et al.

Counsel, if you will, just for the record, make your appearances, please.

MR. HATCH: Absolutely, Brent Hatch and Phill Russell, from Hatch, James and Dodge, on behalf of the Defendant.

MR. BETTILYON: And Mark Bettilyon, on behalf of BYU and Dr. Simmons.

THE COURT: Thank you, Counsel. Let me indicate the following: While I was gone last week, a request was made, from Defendants, for a status conference and that request was made orally. Then today, I've received the Plaintiffs' written response, a written memo; and, therefore, in order to structure this hearing, I've determined that I'll consider Defendants, the movant, for purposes of the questions that we have to resolve today and for the purposes of this hearing. But I intend to proceed as we are, in the order of subjects that were raised in the Plaintiffs' memo.

In preparation for this hearing, I've reviewed the written memo of the Plaintiffs and the pertinent exhibits, including the scheduling order,

[4]

1 which refreshes my memory there, as well as the
2 deposition scheduling calendar, which was included and
3 the subpoenas that were included. I have not had the
4 opportunity to re-review the Hooper letter, although I
5 remember it's existence, but to the extent that you may
6 refer to it, you may, if it's pertinent, refresh my
7 memory as to the content. I know that we ordered it
8 disclosed.

9 MR. HATCH: It's here.

10 THE COURT: All right.

11 MR. BETTILYON: And, Your Honor, I didn't
12 attach it because I didn't want to mark anything under
13 the seal but I do have a copy for you.

14 THE COURT: Okay, that is fine. I don't
15 know to the extent that we will have to go through it.
16 So with that having been said, and following the order
17 that has been setout in the written BYU memo, I want to
18 take each subject as it comes and hear brief argument on
19 it, let me rule on that, and then we will go to the next
20 one. As indicated in the BYU memo, the first relates to
21 the number of depositions, generally, that can be taken.

22 Mr. Hatch, I'll ask you to address that,
23 and, particularly, I do note that the original
24 scheduling order had a limit of 25.

25 MR. HATCH: Yes, Your Honor, you are right.

[5]

1 I did call your chambers to see -- we had, I had raised
2 with Mr. Williams, on behalf of BYU, and while we were
3 all in New York, almost two weeks ago, these issues,
4 which we had sent letters and we're recent impasse, so I
5 did call your chambers in order to see how you would
6 like us to raise this, and I think these informal
7 hearings like this are quite useful.

8 THE COURT: I don't disagree, Mr. Hatch.
9 This is what I had before me.

10 MR. HATCH: I understand.

11 THE COURT: So we will address it that way.

12 MR. HATCH: I understand. And we treated it
13 informally and that is why you didn't get any kind of
14 filing from us. I can address that specific question, I
15 think, as to the number of depositions. I mean, I think
16 a lot of these are arguments as to specific reasons why
17 they don't think we should get specific additional
18 depositions that we have asked for. So I can address it
19 in each deposition or address it --

20 THE COURT: We can do it deposition by
21 deposition, as long as we are all of the understanding
22 and agreement that the scheduling order and all previous
23 orders have limited each side to 25 depositions.

24 MR. HATCH: Well, yes. And just so we are
25 clear, Your Honor, I believe, obviously, that that

[6]

1 limitation was to fact witnesses. And my understanding,
2 I didn't count them up today, but I think BYU has used
3 all of their's, or possibly had one left. I think they
4 used all of their's, and we had like three or four we
5 didn't use, but I think that was regarding fact
6 discovery. Today, we are talking about expert
7 witnesses.

8 THE COURT: Expert witnesses.

9 MR. HATCH: Except for the reopening of the
10 depositions regarding your Motion to Compel and the
11 Hooper letter, and those we're asking for a fairly
12 limited -- we are not asking for full-blown depositions.
13 We're asking for a limited --

14 THE COURT: Although in that regard, you are
15 asking to re-depose Dr. Bateman, and who else?

16 MR. HATCH: Mr. Hooper and anyone else. I
17 think -- I have a proposal that, you know, when we
18 address that, that I can, but the only other one that
19 has any kind of a fact component to it would be the
20 Simmons' deposition. They have argued that, and we had
21 raised that issue with them, and as BYU put in their
22 papers, I think, kind of twisted a little bit. I would
23 like to give you the context of that.

24 THE COURT: Okay. You can do that, but I am
25 going to go back, for purposes of organization, to

[7]

1 address it as setout in the BYU memo.

2 MR. HATCH: So you want him to address
3 the --

4 THE COURT: No, I want you to. We know it's
5 25 depositions of fact witnesses.

6 MR. HATCH: Fact witnesses.

7 THE COURT: And that some experts were
8 allowed, or two depositions were allowed to occur over
9 two days?

10 MR. HATCH: Correct.

11 THE COURT: All right.

12 MR. HATCH: And those would be fact
13 witnesses, as well.

14 THE COURT: All right. But let's address
15 the general prospect of the depositions that fall in
16 that category and the time constraints.

17 MR. HATCH: Okay. So you want to address
18 the depositions required by the Hooper letter being
19 compelled first?

20 THE COURT: Let's talk about that.

21 MR. HATCH: Okay, I'll do that. Your Honor,
22 let's see if I can get -- my papers are a little out of
23 order so I will scramble here for just a second.
24 Mr. Bettilyon's good work caused me to scramble a little
25 this morning and pull some stuff together this morning,

[8]

1 but I did.

2 Your Honor, I would like to give you
3 portions of two deposition transcripts. This is just,
4 this is just to give you some context, Your Honor. I
5 took Dr. Hooper's deposition, and as you can, as you can
6 see, this is involving the letter.

7 Page 26, I asked, "Is there some reason you
8 qualified that answer? Generally, do you recall asking
9 him to write a letter," talking about Dr. Simmons.

10 He says, "No."

11 "Did you receive a letter from him?"

12 "I believe I did."

13 "And do you recall what the content of that
14 letter was?"

15 "I instruct you not to answer.
16 Attorney-client privilege, work product."

17 Then, of course, I quizzed him on what the
18 privilege was. Then, Dr. Bateman, similar things; he
19 was not allowed to testify, look at, or even testify
20 about the letter, so he was questioned, starting on page
21 77, "Do you know what the contents are of the letter
22 that he attached there, that was his letter to
23 Mr. Hooper?"

24 "I don't remember the contents."

25 "Did he ever tell you, during the first

[9]

1 meeting, about his interactions with Mr. Hooper?"

2 "No."

3 "Did Mr. Hooper report to you?"

4 "I think he reported to Mr. Wilkinson."

5 "I see, and I think you told me that
6 earlier. I apologize for that. Do you have any idea,
7 sir, what the content of Dr. Simmons' letter to
8 Mr. Hooper was?"

9 "At this point, I don't."

10 "Do you have any reason to believe that the
11 content of the letter has anything to do with the claim
12 against Monsanto, or whether Dr. Simmons' complaint
13 simply about the University's lack of support for his
14 work?"

15 "I don't know any of the contents of the
16 letter but it obviously it relates to COX-2."

17 This all involves the Hooper letter, and in
18 BYU'S submission to you for this morning, they have
19 alleged that this isn't a relevant pertaining thing
20 because the letter itself -- and Mr. Bettilyon says he
21 has the letter that we can look at it if you want --
22 refers back to things that happened in 1991. And that
23 is true, but the reason we were discussing this with
24 Mr. Hooper and with Mr. Bateman at the University is
25 because it goes to the heart of one of their claims and

[10]

1 their claims for damages in this case, Your Honor.

2 They have made allegations, in this case,
3 and asked for billions of dollars, not millions,
4 indicating that they believe that Pfizer should have
5 told them about patented products, that if they would
6 have -- if we would have told them, they would have made
7 lots of money. I mean, that is just a generalization,
8 obviously.

9 We have put over the fence, and we've
10 elicited testimony on this from witnesses, that what was
11 really going on at BYU at the time, and what was
12 happening, was that BYU themselves had decided that the
13 Simmons' materials weren't patentable, the Simmons'
14 material themselves were of no value, and that Simmons,
15 himself -- and this would go to statute of limitations,
16 it would go to liability and causation questions, and it
17 would go to damages -- that Simmons, himself, was having
18 an ongoing dialogue with senior people at the
19 University, who were basically giving him short -- who
20 felt that the material had zero value. That is the
21 heart of this case.

22 So when they refused to -- we had a
23 suspicion, of course, that this Hooper letter was
24 absolutely not privileged, that was sent by Dr. Simmons
25 to Hooper, and then copied to Bateman and sent directly

[11]

1 from Simmons to Bateman, Mr. Bateman, for the purposes
2 of trying to get across his opinion, which is the exact
3 opposite of what happened today, Your Honor.

4 THE COURT: Mr. Hatch, when was the Hooper
5 letter disclosed by order of the Court?

6 MR. HATCH: Well that, is something
7 interesting. In their brief, you know, they talk about
8 timing here. They said the production was ordered on
9 July 14th and that they disclosed it shortly thereafter.
10 It actually took them a month to give it to us. I have
11 the email here.

12 THE COURT: So August sometime?

13 MR. HATCH: Yes, mid-August.

14 THE COURT: August of 2010?

15 MR. HATCH: Correct.

16 THE COURT: And you deposed him?

17 MR. HATCH: Oh, no, not 2010. This was your
18 order.

19 THE COURT: That is what I am asking.

20 MR. HATCH: Your order was July 14, 2011.

21 THE COURT: Okay.

22 MR. HATCH: So it was this summer.

23 THE COURT: It was disclosed to you after
24 the deposition was taken?

25 MR. HATCH: After the depositions were

[12]

1 taken, and then a month later, after the order, they
2 produced it to us, and then we brought the request to
3 finish those depositions where they refused to let them
4 answer the questions.

5 Now -- well, I guess Mr. Bettilyon can
6 address the rest of that, if he wishes to. Do you want
7 to break it down that way?

8 THE COURT: That is fine.

9 MR. HATCH: Okay.

10 THE COURT: When was the date of my order?

11 MR. BETTILYON: July 14th, I believe.

12 THE COURT: Of '11?

13 MR. BETTILYON: Of '11.

14 THE COURT: I thought it was sooner than
15 that, but all right.

16 MR. BETTILYON: That is the date I pulled
17 off the dockets. I think that is accurate.

18 THE COURT: Okay, thank you.

19 MR. BETTILYON: Let me point out, Your
20 Honor, that the Hooper letter, and I have a copy here,
21 and I meant to bring multiple copies, but do you want to
22 verify that is the letter we are talking about. Right?

23 MR. HATCH: I believe so. Is this -- I
24 don't think this has -- what this doesn't have -- I
25 think this doesn't have the cover letter going to

[13]

1 Dr. Bateman, Mr. Bateman.

2 MR. BETTILYON: Okay.

3 MR. HATCH: Dr. Bateman. I think he is a
4 doctor. Right?

5 MR. BETTILYON: So there's a cover of the
6 letter that goes with this but the gist of the facts are
7 contained here.

8 MR. HATCH: No, the gist of the facts that
9 we are complaining about that surround the delivery of
10 the letter to Dr. Bateman, not what facts were contained
11 in there; although those are relevant to understanding
12 the context of the delivery of the letter.

13 And, Your Honor, just so I -- if I am not
14 clear before Mark starts, so I can be fair to him, Your
15 Honor, we are not asking for a full day. You know, we
16 think, you know, probably to make sure we get through it
17 all is probably, you know, a couple hours. We are not
18 looking for a full day.

19 THE COURT: Mr. Bettilyon?

20 MR. BETTILYON: And, Your Honor, let me say
21 this: The Hooper letter has been on a privileged log
22 since 2007, and by his own admission, Counsel has
23 acknowledged that they deposed a witness about this
24 Hooper letter, in October of last year. The witness
25 didn't answer questions about it, and they apparently

[14]

1 showed him the privileged log entry and asked about it,
2 so they have been on notice that there may be issues in
3 this for some period of time.

4 They did not file the motion the related to
5 the release of the document until right at the
6 conclusion of fact discovery. So I think it was filed
7 the days, or the day of, the end of fact discovery. So
8 I think if you just look at all of that, I just don't
9 think there is a basis now, at this late date, to reopen
10 discovery with respect to this document.

11 I have articulated, in the brief I filed, a
12 few of the instances where Pfizer had also produced
13 documents late. Some of those we believe are very, very
14 serious, and, frankly, far more serious than the
15 production of this letter. I also think that if you
16 look at the letter that is attached as Exhibit E to the
17 materials that I provided, it's a letter we sent to
18 Mr. Hatch just recently, and in that letter, we
19 articulate where the information that is in the Hooper
20 letter is really found elsewhere in the body of the
21 evidences that were produced in this case.

22 For example, Dr. Simmons gave a deposition,
23 in 2002, and that deposition was taken by Pfizer's
24 counsel. It was in a different case, but there were
25 actually questions that were asked in that case that

[15]

1 related to the very same issues. And, in fact, he more
2 or less paraphrases the kinds of things he said in the
3 Hooper letter, about what BYU told him about what was
4 discoverable and what was not. So they were certainly
5 alerted to the fact that that was issue, or topic, in
6 which they could have addressed and could have talked to
7 Dr. Simmons about that and could have talked to other
8 people, as well.

9 And so I just think that on balance, if we
10 are going to reopen discovery to do this, you are going
11 to have to, in fairness, reopen discovery on all these
12 other issues. We are a right to re-depose all of the
13 witnesses I have mentioned; Dr. Needleman, Dr. Siegburg,
14 Dr. Hauser and others, and I think at some point you
15 just have to say enough is enough.

16 THE COURT: Mr. Bettilyon, I don't know, in
17 which litigation was it? The Rochester litigation --

18 MR. BETTILYON: Yes.

19 THE COURT: -- that this was referenced?

20 MR. BETTILYON: That is where it was first
21 referenced. There are also other letters and other
22 documents that are articulated in this letter, where it
23 was discussed as well. So I think it's just in
24 fairness, yes, certainly they, perhaps, should have had
25 the letter sooner. I don't think the Court found that

[16]

1 we didn't have a good faith basis to make, to put it on
2 the privilege log in the first instance.

3 THE COURT: I did not -- I just disagreed
4 with you.

5 MR. BETTILYON: You disagreed with us, and
6 we understand that, and we produced the document. But I
7 just think that when it's on a privileged log, since
8 2007, and a witness, in 2010, says, "I'm not going to
9 answer questions about that document," you know it may
10 be important, and then you file a motion the very last
11 day of the discovery cutoff period. And you're also in
12 a situation where you, yourself, have produced documents
13 late. In fact, just last week, Your Honor, we received
14 audit results for the Kalamazoo facility, and those are
15 very important documents in this case.

16 THE COURT: And the personnel file.

17 MR. BETTILYON: And the personnel files we
18 received months after those depositions were taken if we
19 are going to go back to fact discovery, which ended in
20 February, and say we are going to reopen depositions, I
21 just think that opens up a can of worms that we just
22 can't do. And I mean, on balance, is there isn't enough
23 harm here to allow these depositions to proceed.

24 They are going to have the opportunity,
25 during Dr. Simmons' scheduled deposition, to ask him

[17]

1 whatever questions they want to ask him about these
2 letters. We also have the fact that Elder Bateman is 75
3 year's old, is unlikely to remember much of this, and
4 really wasn't involved in the facts. I mean, his
5 factual involvement would only be: I received a letter
6 from Dan Simmons that had another letter attached to it
7 and I don't remember a whole lot beyond that. And I
8 think the same is, frankly, true of Mr. Hooper. So I
9 just think the balance is not worth it, nor is it
10 appropriate for us to re-open discovery. We need to do
11 it for all things and I think that is not appropriate.

12 THE COURT: Mr. Bettilyon, will you show me
13 a copy of the Hooper letter, please?

14 MR. BETTILYON: Yes, Your Honor. And what
15 they care about the most is on the second page where
16 they talk about inventions, in that first paragraph, and
17 I didn't have the cover letter. Actually, I didn't
18 realize there was a cover letter to it. I got that from
19 one of their experts who has been given a copy. That is
20 the copy I got from the expert, in his deposition.

21 THE COURT: All right, thank you.

22 MR. BETTILYON: The attachment was produced
23 in other -- so the attachment has been produced to them
24 before.

25 THE COURT: All right. That refreshes my

[18]

1 memory as to contents of the letter.

2 MR. BETTILYON: Okay. And unless the Court
3 has any other questions, I think I will rest on that
4 issue.

5 THE COURT: All right. Mr. Hatch, well, I
6 am trying to pose a question to you; is there any
7 question that, as indicated by Mr. Bettilyon, that
8 Pfizer was not on notice of the existence of this letter
9 early on, through the privileged log and through the
10 Rochester litigation?

11 MR. HATCH: I don't know what the timing of
12 that is because I am not sure what the relevance of that
13 is.

14 THE COURT: The relevance of what?

15 MR. HATCH: What the timing of when we knew
16 about the letter from the privileged log.

17 THE COURT: Well, he's raised it and said --

18 MR. HATCH: I know he's raised it. That is
19 the point I am trying to make, is that really,
20 Mr. Bettilyon is creating, essentially, a strong man
21 that he can knock down here, which is all these things
22 that are outside; oh, you should have known this, you
23 should have known that, you had time to do this.

24 The reality is we brought a timely Motion to
25 Compel on a document that they refused to allow people

[19]

1 to answer questions, allowed us to use it. They did not
2 give it to us so that we had the opportunity to depose
3 witnesses on one of our -- or the main theory in our
4 case. And you granted that Motion to Compel, that it
5 had been improperly withheld; regardless of motives, it
6 had been properly withheld and now produced. And the
7 fact that we could have deposed on topics that were
8 related to this letter, we don't have the letter. How
9 do we do that? I mean, I think it's kind of an act of
10 shelving here.

11 THE COURT: Can't Dr. Simmons authenticate
12 the letter and cross-examine him on that?

13 MR. HATCH: But, Your Honor, that isn't the
14 issue here. That is why they have written their brief
15 the way it is. That is not the issue. I think
16 Dr. Simmons can authenticate the letter. The issue is
17 that we are discussing today is not that issue.

18 The issue we are discussing today is, should
19 we have a fair opportunity to depose Dr. -- Mr. Hooper
20 and Dr. Bateman, as to -- Dr. Hooper and Dr. Bateman, I
21 believe, as to the conversations they had regarding this
22 letter, their reaction to this letter, whether BYU was
23 truly -- the things that go into -- I think it's on the
24 second page of that letter -- that go into, why is
25 Dr. Simmons fighting this right now. Because we contend

[20]

1 that it was because BYU did not support it, didn't
2 believe his materials had value, and that, you know, we
3 are entitled to know what the BYU administration's
4 reaction was to all this, what they understood, who they
5 talked to, whether they talked to people in BUY's
6 technology office.

7 All of that was denied us because, in the
8 privileged log, all it would have said was letter from
9 Dan Simmons to Gary Hooper, and it's privileged. We
10 didn't get the content of it and we didn't get to fairly
11 inquire about it. So saying that, you know, we may have
12 covered some of the factual areas that are in this
13 letter, in other depositions, doesn't give us the
14 testimony as to this letter, why it was written. This
15 is a letter, in 1999, attaching an older letter.

16 THE COURT: All right. I guess I am having
17 trouble agreeing with you; although, I understand your
18 arguments that timing doesn't pre-empt it, your opinion,
19 that you were on notice.

20 MR. HATCH: Okay. But we couldn't have
21 deposed -- the fact is, you ordered it compelled.
22 Correct?

23 THE COURT: Right.

24 MR. HATCH: And we didn't have the letter
25 until a month after your order. Right? No one's

[21]

1 disputed that. So how would we have deposed someone on
2 the contents of that letter? I gave you the discussion
3 that was had, just from the privileged log with
4 Dr. Bateman, and without the letter in front of him, he
5 wasn't -- he was able to say it was about COX-2, that it
6 was relevant, but he wasn't able to discuss it, nor
7 would his attorney allow him to.

8 THE COURT: All right.

9 MR. HATCH: So when would we have been able
10 to ask those questions?

11 THE COURT: Why can't you ask those
12 questions and the intent of the letter with Dr. Simmons?

13 MR. HATCH: Well, I think -- I agree. I
14 mean, Mr. Bettilyon, to be fair, I think has offered
15 today that we can ask these questions of Dr. Simmons,
16 during his expert deposition that is coming up. We
17 think to be fair, because this is stuff that we should
18 have been able to inquire about before, we should get
19 additional time for that.

20 But Dr. Bateman and Dr. Hooper are not
21 expert witnesses. Their depositions aren't -- and
22 Dr. Bateman is the key here because we want to know why
23 BYU administration didn't move forward, in 1999; why
24 didn't they do something when Dr. Simmons came forward;
25 You know, what was their reaction; what was their

[22]

1 inquiry; what did they find out about what the
2 technology transfer, obviously, had done in the past.
3 None of that. All of that was denied to us. So a
4 short, a short deposition of Dr. Bateman and Dr. Hooper,
5 would be in order because they refused to let us ask
6 those questions. That fact has never changed.

7 THE COURT: Now the entirety of the
8 depositions isn't before me, but I know that they were
9 disclosed, maybe the minutes were disclosed to you.
10 Were there minutes of BYU's meetings and conferences
11 disclosed? I simply can't remember.

12 MR. HATCH: I don't think --

13 THE COURT: In which there was discussions?

14 MR. HATCH: I don't think that they were
15 relevant to what we are asking about, in this particular
16 letter, which is a key letter. And the fact that it
17 simply was sent to Dr. Bateman, and what his reaction
18 was, and the internal discussions are important here,
19 and that is why -- we are not trying to overreach here.

20 THE COURT: All right. Let's go to the
21 other argument made by Mr. Bettilyon; that if these
22 depositions were to be reopen, for whatever limited
23 purpose and for whatever short period of time, how does
24 that then balance, and shouldn't it balance with the
25 fact that Pfizer has, again, been late in disclosing

[23]

1 some of it.

2 MR. HATCH: First of all, I disagree with
3 that. When he talks about personnel records, if we need
4 to get into that, we will produce it to you. We did
5 what they did. So almost everyone of their witnesses
6 was the exact same issue. The problem is, if I were
7 you, I don't see why are we getting into that.

8 We brought a proper Motion to Compel, we
9 brought it timely, as Mr. Bettilyon said, and the
10 document was compelled, and we should be about to ask
11 questions. He now is changing the game. It's a typical
12 thing we get. If we, if we want something, okay, we've
13 got to have something. It can never be just because
14 it's right. Where is -- the fact discovery is over.
15 Where, if those things were important and if those
16 things were really the big issue he is making them
17 today, show me where the Motion to Compel was on those.
18 There is no Motion to Compel on those. It is not the
19 same situation.

20 If he really truly felt that was essential
21 to his case -- there are all kinds of things that both
22 parties were fighting about, through the entire fact
23 discovery phase, as Your Honor knows, and we brought a
24 Motion to Compel on something that was very important on
25 us, that we were denied testimony. He can't produce a

[24]

1 single motion before the fact discovery cutoff, or
2 after, frankly, where they asked for these things. This
3 is simply to draw your attention away from what the
4 issue at hand is and say all these other problems --

5 THE COURT: Let's assume that it does get my
6 attention.

7 MR. HATCH: I understand.

8 THE COURT: Because I am interested in the
9 case moving forward, and I see this as --

10 MR. HATCH: Wouldn't that be moving
11 backwards, because if you are going to open fact
12 discovery like that, then I will bring up every single
13 instance where they didn't give us the documents they
14 should have beforehand, we got it afterward, and we
15 have, each of us, about ten more depositions.

16 THE COURT: Then let's look at how the case
17 would move along if none of this were allowed.

18 MR. HATCH: Well, if none of it is allowed,
19 then none of us will be paying much attention to it,
20 unless we -- you know, the only option at that point is,
21 you know, further motions on that. But, I mean, we are
22 looking this, in this particular instance, we are
23 looking for a couple-hour deposition. I think reality
24 is, probably because what we are looking for is the
25 administration's approach to this and response to

[25]

1 Dr. Simmons, and that --

2 THE COURT: Okay. But, Mr. Hatch, hasn't
3 that been --

4 MR. HATCH: No.

5 THE COURT: -- a defense theory --

6 MR. HATCH: Yes.

7 THE COURT: -- for as long as this case --

8 MR. HATCH: Yes, yes, and we've approached
9 it and have gotten some documents on it and some support
10 for it, but here was a key document and that is why they
11 kept it from us. You can't look at that document, and
12 Your Honor didn't, did exactly this analysis, and say
13 that was ever privileged. It's not to a lawyer. It's
14 not from a lawyer. It doesn't copy a lawyer. It was
15 some kind of concoctive theory that had them put that on
16 the privileged log, knowing that this was a very
17 damaging letter, and knowing that it was sent to the
18 President of BYU, and knowing that at the highest
19 administration level, that is where Dr. Simmons felt he
20 wasn't getting his support.

21 And so, yes, we have gotten some discovery,
22 we have gotten some support for our theorys, in the
23 case, and our defense, but here our key documents. I
24 have given you the deposition excerpt. We were denied
25 the opportunity to ask the decision makers about that.

[26]

1 We didn't have it. We couldn't put it down, in front of
2 Dr. Bateman, and say, "Do you remember him saying this?
3 Did you agree with him? Did you not?"

4 THE COURT: Okay. Well, I think he
5 acknowledges -- well, one of them acknowledges receiving
6 a letter.

7 MR. HATCH: Correct.

8 THE COURT: Or two letters.

9 MR. HATCH: So as far as your question about
10 how does this affect discovery, I think very minimally,
11 because we can do that deposition whenever, you know, is
12 within reason, whenever is convenient for Dr. Bateman.
13 And it doesn't have to be a particularly long deposition
14 because it is just one subject area of inquiry.

15 THE COURT: Wouldn't it make some sense to
16 wait until after your deposition of Dr. Simmons?

17 MR. HATCH: Like I said, I think the timing
18 is less important than the taking of the deposition.
19 Let me make sure, let me think through my head and make
20 sure -- yes, I mean, I think there are probably orders,
21 an order I would prefer, but I think, ultimately, you
22 know, we want the facts on that, and so whatever we get,
23 it would be appropriate. I think it would be -- so it
24 could follow the October 31st expert discovery cutoff, I
25 think, if necessary.

[27]

1 THE COURT: All right. Anything else,
2 Mr. Hatch?

3 MR. HATCH: Not at that point.

4 THE COURT: Mr. Bettilyon?

5 MR. BETTILYON: If I could just briefly,
6 Your Honor, I want to point out two things; one is, and
7 I don't want to belabor this, but Pfizer has been under
8 a court order to produce its documents. They didn't
9 produce Karen Siegburg's personnel file until six months
10 after deposition.

11 Now when they did that, what they said to us
12 in letters -- and Mr. Hatch certainly has access to
13 them, although, I think it was before he was on the
14 case -- they said, that same information was found in
15 other documents and they pointed it out. Now, I was
16 just reading, in this letter that we attached to the
17 Motion, which is Exhibit E, and, in 2002, Mr. Simmons,
18 Dr. Simmons, essentially --

19 THE COURT: Where are you? I am looking at
20 the letter.

21 MR. BETTILYON: It's in the second
22 paragraph. And if we start with the sentence that is
23 about six lines down, "Dr. Simmons testified..."

24 THE COURT: Okay.

25 MR. BETTILYON: "That though he had made an

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1 enormous discovery, he was told by BYU Vice-President of
2 Research, 'I hear what you are saying. It sounds
3 interesting but I can't do anything.'" That is,
4 essentially, the same thing as the Hooper letter. That
5 is what the Hooper letter says.

6 He testified that he also reported his
7 discovery to the technology transfer office, and that
8 would be to Dr. Hooper, and gave them his view that BYU
9 should patent it. "I felt that they should get a patent
10 on COX-2 and its uses, uses and expression system."
11 Indeed, Dr. Simmons testified that he approached the TTO
12 many times, trying to get them to patent this.

13 Now they had that testimony, in 2002. That
14 deposition has been made part of the discovery, in this
15 case; although they did not have the Hooper letter, I
16 think they, essentially, had the gist of it right there.
17 That is the same kind of testimony that is found in the
18 Hooper letter.

19 They are making a big deal about it, Your
20 Honor, but I think that, frankly, that has more to do
21 with the fact they have new lawyers on the case who
22 would like to reopen discovery and ask different
23 questions than were asked the last time around. But
24 that isn't a basis to open discovery. And if we are
25 going to have a level playing field, we have to reopen

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1 discovery for all of these things.

2 We made strategic decisions not to raise
3 issues like Karen Siegburg's deposition, because we have
4 been to prior hearings with you, and we've heard you
5 tell us very loudly and clearly that we needed to move
6 on with this case, and we have. And we believe that
7 that same advice applies to Pfizer and that they need to
8 move on with this case. There isn't anything that they
9 didn't already know, that they can't -- you know, and
10 they get to depose Dr. Simmons, anyway, and they can
11 spend that time however they want with him, and we just
12 need to move on.

13 THE COURT: All right. I am prepared to
14 rule on this.

15 MR. HATCH: Your Honor, the only part that I
16 would mention is this action suggests that it went up to
17 the president of the university.

18 THE COURT: No, I agree with that, but I am
19 going to rule in this case, Mr. Hatch, that you are not
20 going to be allowed to reopen the depositions of
21 Dr. Bateman or Dr. Hooper. I think that the information
22 you have has been sufficient to allow you to determine
23 who your witnesses will be and also to continue with
24 your deposition of Dr. Simmons. So I am going to deny
25 the request as to those two depositions. Now what else

[30]

1 do we need to? I think we have gone off our chronology
2 a little bit.

3 MR. HATCH: I am not certain where you want
4 to go next.

5 THE COURT: All right. It says Pfizer
6 should not be given an extra day to depose Dr. Simmons.

7 MR. HATCH: Okay. I am sure I have
8 everything out of order now.

9 THE COURT: That is why I decided to follow
10 the written response.

11 MR. HATCH: I've got in the box, and, you
12 know, I guess probably the least weighty of my arguments
13 is, just the weight of what is Dr. Simmons' work. He is
14 given -- we are being, we are being somewhat treated
15 here by the other side as though somehow this is some
16 small case, and Dr. Simmons is some small player, and
17 has already been deposed when he was deposed, which I
18 think it was almost three years ago, as a fact witness.

19 Since that time, and I may have gotten the
20 count wrong on parts of this, but he's given three
21 extremely lengthy expert reports, in which, you know,
22 this box represents, not just Dr. Simmons, but I brought
23 all of them over, if we need. But this portion of the
24 box, everything but the last three binders, this is all
25 Dr. Simmons' expert reports, supplemental reports.

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1 THE COURT: I get it.

2 MR. HATCH: Rebuttal expert reports that he
3 filed in this case, and that is without the exhibits.
4 If I brought the exhibits, I would have had to bring
5 over five or six of these boxes. He's filed six
6 declarations. Every single time we filed a motion for
7 summary judgment, we have gotten extensive declarations
8 from Dr. Simmons. Okay? And since we've begun the
9 expert discovery, I will just read a couple of these, we
10 are finding out -- where is my pile? Let me see if I
11 can get these right. They are out of order.

12 THE COURT: Mr. Hatch, I will let you make
13 whatever argument you want to, but I am inclined to
14 allow the extra day, based upon my decision, as to the
15 Hooper-Bateman matter.

16 MR. HATCH: Okay. Well, I killed a lot of
17 trees. I was ready to burn up more tape and trees.

18 THE COURT: I don't doubt you can do that.

19 MR. HATCH: The only thing I can say, and
20 maybe based on what Mark has to say, I will, but, you
21 know, I was prepared, just for the experts we have gone
22 through, to read from depositions where literally
23 every -- not every, but an enormous number of questions;
24 where did you get this information? I got it from
25 Dr. Simmons. And it's from his expert reports, from

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1 what he called, and in numerous instances, what he told
2 them recently because they couldn't find it in the
3 expert reports, and it wasn't in any of the documents
4 produced. So, you know, there's a mountains --

5 THE COURT: All right. Unless Mr. Bettilyon
6 can convince me, based upon my previous ruling, that
7 that should not be allowed, that is what I am inclined
8 to do.

9 MR. BETTILYON: Well, I'm hoping I can.
10 Your Honor, I should mention that Trudy Simmons,
11 Dr. Simmons' wife, is in the courtroom. I think she may
12 start crying if you allow this deposition.

13 THE COURT: I am sympathetic to that fact.
14 I am not sure that that's a basis on which we can --

15 MR. BETTILYON: Part of the facts that you
16 have before you are incorrect. Let me walk through
17 chronology in this case. In February of this year, the
18 other side asked for another day to depose Dr. Simmons.
19 They weren't entitled to one but we agreed to allow them
20 to depose him again. And I have a quote from that
21 letter, which we attached, where they say that, you
22 know, they'll depose him for one more day. He's a
23 so-called expert, so on and so forth.

24 But shortly thereafter, on February 18th, I
25 think that letter came out like the 16th, so a couple

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1 days later, they received Dr. Simmons' first expert
2 report. It was 183 pages long and it's certainly not
3 half of that box. And they received that right after
4 writing this letter, right after this parties reached an
5 agreement regarding the fact that they can depose him
6 again.

7 On June 10th, we provided a supplemental
8 report which was to replace the original report. So
9 they count that, in the documentation what they told
10 you, that supplemental report which they received on
11 June 10th, was 196 pages, so slightly bigger than the
12 original report. But, again, in June, when they
13 received that document, no lawyer calls BYU and says,
14 "We now need more time to respond to these issues. The
15 agreement we reached in February isn't going to satisfy
16 us. We need to do more." And then most recently, on
17 August 26, they received Dr. Simmons' rebuttal report,
18 and it's 50 pages long, so I don't think that additional
19 50 pages can be the basis to depose Dr. Simmons for an
20 extra day.

21 I also want to point out, Your Honor, that
22 there is a little bit of gamesmanship going on here, and
23 that is, BYU made the decision to provide an expert
24 report from Dr. Simmons because we've looked at Rule 26
25 and we are uncertain as to whether he is a fact witness

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1 and needs to provide an expert report or not. He is
2 going to testify at trial as a fact witness, but his
3 fact testimony clearly will contain a lot of scientific
4 evidence, and we have provided, in all instances with
5 all of our experts, very detailed expert reports.

6 But the reality is we don't really need to
7 provide that, I don't think, under Rule 26. We have
8 done it as a precaution, and I want to point out Pfizer
9 hasn't done that. Pfizer hasn't provided any expert
10 reports from any of its fact witnesses, and, yet, it's
11 going to have five or six players come to the table, and
12 who will testify at trial, and who will give scientific
13 testimony, just as Dr. Simmons. But we are not going to
14 have an opportunity to depose them because they didn't
15 provide expert reports.

16 But the bottom line, Your Honor, is there
17 just really isn't time to conduct this discovery. I
18 mean, you saw the calendar. The days where there are no
19 depositions scheduled right now, in this month, are not
20 scheduled because it didn't work for anybody. Those
21 days would have depositions on them. We're already
22 double booked on deposition days. Dr. Simmons has been
23 attending many of these depositions because he does
24 understand the science and many of these experts are
25 science people. And I think if I have to go back and

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1 tell him he's going to be deposed for a second day, he
2 may have a nervous breakdown, and I am not kidding on
3 that. I think it's going to be -- it will be very
4 difficult for him to do that, and I just don't see any
5 basis for doing this.

6 We would have loved to spend another day
7 with Dr. Needleman, or Dr. Siegburg, or any scientist on
8 the other side of this case, but we all made an
9 agreement, we all agreed two days with witnesses. We
10 all agreed we would do that. Fact discovery is over.
11 We agreed, in February, they could have him for an extra
12 day. They agreed to that and now come back to you and
13 say they want more time. They received his initial
14 expert report two days after they reached that
15 agreement.

16 THE COURT: Okay. Mr. Bettilyon, here is
17 the problem I wrestle with is, I just denied them the
18 opportunity to re-depose Dr. Bateman and the other
19 doctor, Dr. Hooper, and because, in part, that they
20 would have the opportunity to discuss, with Dr. Simmons,
21 these matters during his deposition. Now why shouldn't
22 they be entitled some extra time in which to do that?
23 And I understand that you are concerned about health
24 matters, but I notice Dr. Simmons' deposition is on
25 Friday the 7th.

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1 MR. BETTILYON: Correct.

2 THE COURT: Isn't there sometime on
3 Saturday, or on Monday, that that testimony couldn't
4 appropriately be done and give Dr. Simmons some time?

5 MR. BETTILYON: I don't think they need
6 another day to do that, Your Honor. I think if you say
7 they get one more hour -- they are not possibly going to
8 spend a whole day talking about the Hooper letter, and
9 if that is really what the Court is concerned about, I
10 think we would agree they can have an additional half
11 hour to an hour.

12 I think, quite honestly, if we are making a
13 decision about what would be best, I think we would
14 rather offer them Dr. Hooper and Elder Bateman, to have
15 them re-depose them, rather than spend another day with
16 Dr. Simmons, because it is going to be -- and with all
17 due respect, Your Honor, this case has been very
18 difficult on Dr. Simmons, as I am sure you can imagine,
19 and he is just about near death's door, given everything
20 that he has had to put up with and all the work that he
21 is required to do. I think the stress of that
22 deposition would be inappropriate, and I don't think
23 there is no way they are not going to ask him -- I will
24 be surprised if they have half an hour of questions to
25 ask about that Hooper letter.

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1 What this is about is they have eight new
2 lawyers from Wilmer and Helm. They read prior
3 depositions and want to ask him deferent questions than
4 what's been asked for --

5 MR. HATCH: Can I make an objection?

6 THE COURT: Yes, you can.

7 MR. HATCH: I mean, they raised this in
8 their brief. Where's the Wilmer Helm lawyers? I mean,
9 this is just a total red herring, and I am kind of
10 getting a little bit offended by it, Mark, because I am
11 standing here, I have argued every hearing, in this
12 case --

13 THE COURT: Okay, enough. Mr. Hatch, how
14 much time do you need with Dr. Simmons to address the
15 issues raised in the Hooper letter?

16 MR. HATCH: In the Hooper letter itself?
17 Well, we were -- as I mentioned earlier, we were asking
18 for a couple of hours with Dr. Bateman, and they had
19 already agreed with -- this is something they had
20 already agreed with on the Simmons thing, so it would at
21 least be that, if not more.

22 But this really begs the issue -- and I kind
23 of take -- I mean, I am sorry if I take a little bit of
24 offense, but I've argued pretty much every motion since
25 I've gotten this case last October. They -- you know

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1 and they take some liberty with what they put in their
2 briefs, and they've concocted this argument that this is
3 all being done by Wilmer Helm, and they drop this
4 footnote saying, "Well, look at all these lawyers that
5 came in recently."

6 The reason you have done pro hac's recently
7 for lawyers from Wilmer Helm, as in the case because
8 just like them, we are sending people all over the
9 country to cover depositions, prepare witnesses, and do
10 what we can and get everything we can done, in the month
11 of October. A lot of people, people you will never see
12 probably never in a court in this district, but it had
13 to be pro hac so they can potentially participate in
14 depositions. No one from Wilmer Helm is asking for any
15 kind of extension or new information and I have been the
16 one standing up in court and arguing these cases in
17 front of Judge Stewart. And here, periodically, a DLA
18 lawyer will attend with me, but, you know, this is just
19 not a real argument.

20 Now on the second part of this, and, again,
21 you know, he is talking, he is talking -- again, we are
22 playing kind of strongman, kick the strongman down
23 games. He brings up two people who were not -- who have
24 not issued expert reports, and say, "To be fair, we have
25 to open them, too." Wait a minute. We are talking

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1 about since the motion started and since the discovery,
2 the expert discovery phase, I have got three lengthy
3 expert reports from Dr. Simmons. And what he is,
4 essentially, saying is, I shouldn't have an opportunity,
5 my side, to be able to depose him on that and test them.

6 THE COURT: Okay, all right. Now the extra
7 day was agreed to based upon the existence of those
8 reports, or in anticipation of those reports. Correct.

9 MR. HATCH: Yes, yes. Well, not the
10 reports. They were -- the extra day was agreed to in
11 anticipation that he would be giving an expert report.
12 Your Honor, I will be real honest with you; this is a
13 big case. If I were coming here and asking for what I
14 really want, what I really want, then the two main
15 witnesses that we're about to talk about, Dr. Simmons we
16 are talking about, and Gearing, we are going to talk
17 about, I would -- in this size of a case, I would
18 probably want far more than two days. I think I am
19 being fairly generous in that.

20 THE COURT: Okay. Mr. Hatch, I am limiting
21 you, and I am retreating from my position that I will
22 give you what time extra that you, in good faith, need
23 to explore what you might go into as it relates to the
24 Hooper letter and Dr. Bateman's review of that. All
25 right. So how long would that take? Mr. Bettilyon has

[40]

1 said an hour. I will give you up to two. You can do
2 them that day or you can do them on Saturday, the next
3 morning.

4 MR. HATCH: Well, we can work that out.

5 THE COURT: Are you two doing them; the two
6 of you?

7 MR. HATCH: The Simmons' deposition, well,
8 depending on how things go this week, I will probably be
9 there but not taking that one.

10 THE COURT: Mr. Bettilyon?

11 MR. BETTILYON: I won't be down there, but
12 if he wants to work it out; the agreement is they get
13 time to ask questions about the Hooper letter, and that
14 is all they get to ask about, and we will work something
15 out with him a little later on.

16 MR. HATCH: Not just the letter itself but
17 what the area of focus that that letter covers, too.

18 THE COURT: All right.

19 MR. HATCH: Your Honor, if you can belabor
20 me just a minute, here is the problem with this
21 argument; one is on the other half of this, you know, I
22 appreciate him making the argument about Dr. Simmons and
23 his health concern; one is we don't have -- there is no
24 evidence of that with this hearing. And I make that
25 argument somewhat cautiously because I don't want to

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1 tread on anybody's feeling, certainly not Mrs. Simmons.

2 MR. BETTILYON: I can put her on the stand,
3 Your Honor, and she will testify that is not the
4 significant --

5 THE COURT: I'll take that as a proper,
6 Mr. Hatch, if you want her to testify.

7 MR. HATCH: I don't know that she would have
8 the foundation to testify.

9 THE COURT: Okay. She can testify based
10 upon lay observation.

11 MR. HATCH: I understand. I have no doubt
12 he feels stress, but I have been travelling around the
13 country and Dr. Simmons has attending every single
14 deposition. This is, obviously, a very important matter
15 to him. I personally haven't noticed any stress, but,
16 you know, it's certainly a case of much interest but
17 I --

18 THE COURT: Go back to the issue of how much
19 time you realistically need, given the limitations I
20 placed on you. And remember what the standard here is
21 with my management of this case; you know, the abuse of
22 discretion, and I don't know that that constitutes,
23 putting a limit on you does not constitute an abuse of
24 discretion, so go on.

25 MR. HATCH: That is why I am arguing

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1 somewhat strenuously here, Your Honor.

2 THE COURT: I understand.

3 MR. HATCH: If we go through the experts we
4 have looked at, not only do we have all these
5 declarations and expert reports, but I don't think,
6 realistically, we can get through, in an adequate
7 fashion to defend our client, in one day, leaving aside
8 the extra hours for the Hooper issue.

9 In addition to those, virtually every
10 deposition we have taken of their experts, so far the
11 large, the majority -- I mean, the large part of what
12 they are relying on is Dr. Simmons, during this period
13 of time. I will give you a couple of examples, if you
14 will allow me.

15 THE COURT: Let me ask you, how many times
16 now has Dr. Simmons testified?

17 MR. HATCH: His deposition was back in 2008.
18 I think it was -- he had a two-day deposition. And I
19 would also point out, Your Honor, to the extent it
20 matters, and, Mark, correct me if I'm wrong, we only
21 used one of those two-day depositions that were allowed.
22 In the fact discovery, well, I think they used both.

23 This is Dr. Lents, and this just -- and let
24 me give you this one, too. I'm on page 221 of the
25 Lents' deposition, Your Honor, the first one I gave you.

[43]

1 He says, "I want to know, putting aside your deposition,
2 did you have any communications with Dr. Simmons before
3 that deposition where you told -- he told you --" by the
4 way, this is a rough ASCII. This is reason enough.
5 It's not -- it's a little rough. "-- Dr. Simmons,
6 before that deposition, where he told you he
7 communicated to anyone at Monsanto that DuP-697 was a
8 lead compound?"

9 "That conversation may have been more recent
10 than that deposition."

11 These are just examples. And in, for
12 instance, Bell, whose deposition was -- it doesn't even
13 say here -- oh, the 29th, so just a few days ago, page
14 173, "What evidence do you have that Dr. Simmons had
15 conversations with Dr. Siegburg about DuP-697?"

16 "Dan told me that he did, that he did."

17 "When did he tell you that?"

18 "He told me a couple different times."

19 "Is that in any of his expert reports?"

20 "I am not sure."

21 "Is it in any documents that you reviewed in
22 this case?"

23 "Not that I am aware of."

24 "Have you seen any deposition testimony from
25 anyone that Dr. Simmons ever pointed out, to anyone from

[44]

1 Monsanto, that DuP-697 was collected COX-2 him?"

2 "No, but Dan told me that."

3 So in the last period of time, all their
4 expert witnesses are calling up, and sometimes they are
5 talking to him during the break. That is why he is at a
6 lot of these depositions. And where they were, they
7 were concerned that there isn't a -- they don't have any
8 facts in the record, he tells them. And then this was
9 really, I think if I can, Your Honor, this was truly a
10 first for me, in my practice, is when we asked for a
11 30(b)(6) deposition of Brigham Young University, and
12 obviously, I mean, I don't think it's lost --

13 THE COURT: I remember that.

14 MR. HATCH: It's not lost on anybody here
15 that the key the person who knows all this stuff is
16 Dr. Simmons, and the BYU lawyers chose to put up, as a
17 Rule 30(b)(6) witness, an associate with the Beus Firm,
18 one of their lawyers, somebody whose livelihood is an
19 associate and is dependent on the partners who are
20 prosecuting this case on a continuance fee.

21 And if you go throughout, almost constantly
22 throughout, you know: When did you talk to Dr. Simmons.
23 He is talking to him and he is getting the information
24 here. He took notes but he said he didn't keep all the
25 notes. And so almost his entire testimony -- he says

[45]

1 here at the bottom of 11, "Is there anything not in
2 these notes that you believe is important to your
3 testimony here today?"

4 "I'm sure there is."

5 "Can you tell me what it is?"

6 "I can't. I didn't take down a note of
7 everything."

8 Then he on page 13, he's taking about his
9 conversations with Dr. Simmons. "You address each one
10 of the topics, in 14 through 28, in your conversations
11 with Dr. Simmons?"

12 "Yes."

13 "Was it just the one conversation you had
14 with Dr. Simmons to prepare for this deposition?"

15 "No, I had a number of conversations with
16 Dr. Simmons to prepare for this deposition."

17 "Do you know how many?"

18 "I don't know how many."

19 Then he goes on, "It may have been 15. It
20 may have been 20. I don't know. A lot of conversation.
21 We spent a lot of time trying to address the issues
22 raised in Pfizer's notes. We did a lot of work."

23 And these conversations -- and he goes on
24 and on about that. And he goes even further back, and
25 this was quite a lengthily deposition. Obviously, a

[46]

1 30(b)(6) of BYU is a pretty important examination. And
2 so we have a situation where, you know, we are in -- I
3 mean, Your Honor, there are a lot of issues in this case
4 for both parties, admittedly.

5 And since -- certainly since his previous
6 deposition, but certainly since his expert reports and
7 as part of the 30(b)(6), he's transmitted an enormous
8 amount of evidence that we haven't been given in
9 documents, we haven't been given in testimony, and we
10 are hearing it for the first time, translated through
11 experts and through associates of law firms being put on
12 as witnesses, and not really -- and then when asked for
13 details, say, "I don't remember. I just remember
14 Dr. Simmons told me." You know, and so we are in a
15 situation --

16 THE COURT: Couldn't you have the person
17 conducting this deposition asked more insightful or
18 detailed questions?

19 MR. HATCH: Well, like what, Your Honor?

20 THE COURT: I am asking you. If the person
21 who is going to conduct --

22 MR. HATCH: I think if they won't tell you,
23 or they tell you they don't remember; you say, "You had
24 a conversation, what did he say?" "I don't remember," I
25 don't know what you do with that, other than we are

[47]

1 getting this broad, "He is the one that I got all this
2 information from."

3 "Well, point us to a document."

4 "Well, I don't know if there is a document."

5 "Point us to an expert report."

6 "I don't know."

7 "Where did you get it?"

8 "I got it from Dan Simmons."

9 When you have that big of case and you are
10 asking for this much money, it's really, it's really
11 hard for me to defend my client without knowing what I
12 am going to face at trial.

13 THE COURT: Is the person who is going to
14 conduct the deposition of Dr. Simmons as skilled as you
15 are?

16 MR. HATCH: I hope so.

17 THE COURT: Well, then, I think that you can
18 get it done.

19 MR. HATCH: I guarantee I couldn't get it
20 done in one day, Your Honor. There is no way you can go
21 through this material, and I think it is unfair.

22 THE COURT: Don't you have Dr. Simmons,
23 every note that he has, all of the other information
24 that he's provided during the discovery process?

25 MR. HATCH: Let me give you a perfect

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1 example, Your Honor, because some of these questions,
2 some of the ones I just gave you, we were asking, "Where
3 did you get that?" And I think it is in -- it may be in
4 one of the ones I haven't showed you yet. Let me look
5 real quick here. No, I've got -- it may have been one
6 of those, but the answer is, Your Honor, in many
7 instances, and I think let's see, I was in -- I believe
8 it was Dr. -- or Mr. Lents' deposition. Don't hold me
9 to that, but I don't think that it was a very typical
10 one, where we asked, I think, the key questions, Your
11 Honor.

12 He makes, he makes an assumption based on a
13 factual, something factual he was told, and we asked,
14 "Where is that in the documents? Okay, where is that in
15 the notes that has been turned over."

16 "I don't think there is any."

17 So, finally, what he comes up with is,
18 "Well, it may have been in a phone call that Dr. Simmons
19 made to Monsanto."

20 There is no record of that. So, Your Honor,
21 you know, other than being able to go through the
22 things, I don't know how you would get to that. So I
23 admittedly -- I mean, I have seen cases this size where
24 somebody with the importance to the matter as
25 Dr. Simmons would be deposed sometimes for weeks, and we

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1 are asking for an extra day.

2 THE COURT: But you are conducting
3 testimony. Or you're conducting a cross-examination of
4 Dr. Simmons, and you've asked him about the existence of
5 some note or notes. Right?

6 MR. HATCH: Okay.

7 THE COURT: He either says, "Yes, here it
8 is, and you presumably have it," or he says, "No, I
9 can't substantiate that," and you have a good argument
10 to make about his lack of credibility.

11 MR. HATCH: I understand that 100 percent,
12 Your Honor. These are just the expert reports, not the
13 declarations he's filed. That is just the first one,
14 Your Honor. There's 842 paragraphs here. This isn't a
15 fact testimony. This is an expert report. I am telling
16 you what's kind of the next to the -- to that is just
17 the first report. You couldn't -- and you would be
18 lucky to read that in a day. Okay?

19 We have to simplify this down, anyway,
20 to -- you know, some of the paragraphs, we are not going
21 to have questions on, undeniably. Right? And then,
22 which one was that? That was supplemental report,
23 sorry. When he -- you know, when we started filing some
24 things and he wanted the original report. And the
25 supplemental report was, presumably, it is just that,

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1 and it's additional information. There is 673 in the
2 original. So we are up to, well, almost 1,500
3 paragraphs of, apparently according to him, relevant
4 information. This is 182 pages. This one was, what?
5 It's 196 pages. Then we have the rebuttal, which is a
6 little shorter. These are not the exhibits. Like I
7 said, Your Honor, there are boxes and boxes of exhibits
8 that have to be absorbed. This one is a little shorter,
9 it's 146 paragraphs, 50 pages. I would -- and that is
10 just the expert reports.

11 Then there's, you know, let's see, at least
12 six declarations. Mostly shorter, I admit, a lot
13 shorter than these, and that doesn't even -- that
14 doesn't even get to the other experts that are -- that
15 he is feeding information and helping them with their
16 testimony. And so when you think about it, somebody
17 has -- we're getting one day with experts that are just
18 repeating what he is saying, and we are only going to
19 get -- and, you know, as we said --

20 THE COURT: Okay. I hold you to the
21 decisions made by your predecessors; why wasn't
22 additional time requested when the scheduling order was
23 entered? If it was assumed that Dr. Simmons was going
24 to be such import, and of course he is.

25 MR. HATCH: And of course he is. Well, Your

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1 Honor, I guess if you are talking about the Judge
2 Kimball scheduling order that was entered into, I don't
3 know when that was, but at least 2000 --

4 THE COURT: I have a copy of it here. It's
5 2009.

6 MR. HATCH: So two years ago.

7 THE COURT: Excuse me just a minute,
8 Mr. Williams, will you assist Mrs. Simmons with those
9 shades? It looks like she is about to be blinded by the
10 light.

11 MR. HATCH: The original one was 2007.

12 THE COURT: Yes.

13 MR. HATCH: My answer to that would be, Your
14 Honor, that was, all of that, is before. You know, even
15 in Judge Kimball's order, if I remember it right, hard
16 to believe I remember this: Party may file a motion,
17 including information supporting a request for
18 modification of total number of depositions permitted by
19 this order.

20 So even he, back in '07, realized there
21 would be changed circumstances. You couldn't be held
22 rationally. That was a starting point to things that
23 were known in '07, and it's only been part of
24 this -- this only happened during the expert discovery
25 phase. We are talking about recently filed all these

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1 reports, recently. We have been finding out what his
2 involvement is with the other experts, recently. In
3 other words, some of them just this last week during
4 depositions.

5 So I think that is undeniably a part of the
6 reason we are asking for this kind of relief because he
7 is, apparently, you know, and I apologize -- well, I
8 don't really apologize, but I hope it's not too much,
9 but he's, essentially, the hand in the puppet. And we
10 want to be able to talk to the hand and find out where
11 this information is coming and whether there's a good
12 basis, and I think we are entitled to do that. And I
13 don't think a case of this size, asking for two days is
14 really that much of a request.

15 So I would ask Your Honor that we, at least,
16 get two days. I was going to ask for three. I mean, I
17 didn't have it in a motion, but I actually think even
18 more than that would be appropriate. But I think two
19 days to be able to synthesize and get through all this
20 would be somewhat more of Herculean task, and I don't
21 have that kind of body.

22 THE COURT: Okay.

23 MR. BETTILYON: Your Honor, if I can have a
24 brief rejoinder. First, I would like to note that I am
25 sorry Mr. Hatch is upset that I referred to new counsel.

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1 I should include him as new counsel because Dr. Simmons'
2 deposition was taken before Mr. Hatch came onboard. And
3 I should also just point out, and I don't know that this
4 matters, but they have also had lawyers testify as
5 30(b)(6) witnesses. In fact, they did it before we did.
6 So once they had Kathy Owens show up as a 30(b)(6)
7 witness, who is now counsel of record in the case, it
8 just didn't seem like that's fair to point that out as a
9 problem.

10 MR. HATCH: If I can object, as Mark should
11 know, Kathy was a DLA lawyer, but she had been
12 transferred, for purposes of document discovery, to
13 Pfizer, and I can't remember what they call it, but to
14 Pfizer for that purpose. So she was not acting as one
15 of the counsel in this case, as Mr. Ricker has.

16 MR. BETTILYON: I don't know if that makes
17 much difference, Your Honor. Keith Ricker has now left
18 Beus Gilbert, if that makes any deference, so he is not
19 counsel of record, anymore, either.

20 With respect to the time, we reached an
21 agreement on this issue, in February. They received his
22 deposition, his expert report, days thereafter. They
23 got an amended one, in June, and that is the 500 pages,
24 and I am saying that that is really duplicative because
25 it's really just one replaced the other, and it's about

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1 180 pages. If they made this motion, in June, Your
2 Honor, this would be a different situation than making
3 it now.

4 But the bottom line is, we have a deadline,
5 in this case, and everybody is killing themselves to get
6 this stuff done. And I think the Court can probably
7 appreciate that handling literally a deposition a day,
8 and that is what it averages out to, is a Herculean
9 task. And we've had lawyers flying all over the country
10 and that's why I am here by myself today because people
11 are doing things, that no deposition is scheduled today,
12 but people are getting witnesses prepared and we are
13 doing everything. There is just not time to get
14 Dr. Simmons prepared for another day. There is not time
15 to do this. We can't take more time.

16 We still have three depositions that have to
17 be taken after the discovery cutoff date. One of those
18 depositions was postponed last week because co-counsel
19 for Pfizer had a medical problem, and so we had to
20 postpone that. But there just isn't more time to do
21 this, and we can't put these deadlines out any further.
22 Nobody is asking that. If they need a little more time
23 to talk about the Hooper letter, we are happy to do
24 that, but it should be a very limited amount of time and
25 it should be time only to talk about the Hooper letter.

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1 In all honesty, Your Honor, they can do what
2 they need to do with Dr. Simmons in a day. None of this
3 is news, and this notion that Dr. Simmons is feeding
4 these people things is nonsense. I have read every
5 expert report in this case. Ed Lents, his testimony
6 doesn't even relate to anything Dr. Simmons did, nor
7 does it relate to anything here. Dr. Simmons -- Ed
8 Lents testified that Pfizer should have had a clean room
9 in place. It has nothing to do with anything that BYU
10 did.

11 THE COURT: Well, the thing about that that
12 I find unfortunately not that unusual in my experience,
13 but I also note that skilled counsel know how to bring
14 those issues to the forefront and to then argue them to
15 a jury. And sometimes, and I know that there is
16 criticism of criminal practitioners in some regard, but
17 I will tell you what; I think there is a lot to be said
18 for going forward in trial and making your case;
19 particularly when it relates to credibility issues. And
20 so I am trying to do here, or to make a decision here,
21 that is fair to both parties.

22 Now I also understand, Mr. Bettilyon, that
23 Dr. Simmons may not need to attend every deposition, and
24 he may have to make some decisions, based upon his own
25 health priorities verses what, you know, health issues

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1 or concerns maybe raised by extended travel. So, you
2 know, I think that's in the equation, as well.

3 I realize that I have changed my mind, from
4 my initial disclosure. And I always was appreciative of
5 Judge Winder, who would tell people from the beginning
6 where he thought he was going, and then let you tell him
7 why you shouldn't do that.

8 In this circumstance, I think that it is,
9 potentially -- well, it is appropriate to extend it for
10 a half day, to include the Hooper information, not to
11 exceed two hours, and whatever other additional time
12 there is, and that can go into Saturday.

13 MR. BETTILYON: Okay. Thank you, Your
14 Honor.

15 THE COURT: All right. Anything else on
16 that issue?

17 MR. BETTILYON: So two hours is devoted to
18 the Hooper letter and --

19 THE COURT: No more than two hours devoted
20 to the Hooper letter.

21 MR. HATCH: We get three and a half, total,
22 however we use it. Right?

23 MR. BETTILYON: No, two hours for the Hooper
24 letter and --

25 THE COURT: No, what I am thinking of is you

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1 start at 8:30, and you can use up to two hours on the
2 Hooper letter, and you finish by noon. Okay?

3 MR. HATCH: So noon on Saturday?

4 THE COURT: Right. So you can choose that,
5 but no more than two on the Hooper letter, if you have
6 all this other information --

7 MR. HATCH: So I think what Mark is saying,
8 we are getting a half day, but we can't use more than
9 two hours on the Hooper letter?

10 THE COURT: Yes.

11 MR. BETTILYON: In all honesty, Your Honor,
12 the Hooper letter is a red herring, and they will spend
13 half an hour on the Hooper letter, but if that is your
14 ruling, we'll --

15 THE COURT: That is the ruling --

16 MR. BETTILYON: All right.

17 THE COURT: -- as it relates to that. Okay.
18 Now we have to deal with the issue of the subpoenas?

19 MR. HATCH: Or do you want to go to Gering
20 next? Either one, I will do it however you want to do
21 it, Your Honor.

22 THE COURT: You are the proponent here.

23 MR. HATCH: Let me find my notes.

24 THE COURT: Let me indicate, since we are
25 talking status here, and I have not allowed the

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1 Defendants to reopen depositions, and I will not allow
2 the Plaintiffs to move to opening depositions, or reopen
3 depositions; is that understood?

4 MR. BETTILYON: Yes, Your Honor.

5 THE COURT: All right.

6 MR. HATCH: I think I'll make this one
7 as -- I will try to make it simple, but nothing in this
8 case ever is totally. And let me do it this way: Your
9 Honor, undeniably, Dr. Gering has got an extensive
10 report. He is their key witness. He is the witness on
11 damages, which they are asking for an enormous number in
12 this case, as I think Your Honor is aware. Let me --

13 THE COURT: Here is the schedule for
14 Thursday the 6th.

15 MR. HATCH: Correct, Your Honor. And can I
16 point out, Your Honor, that as hotly disputed that this
17 case has been, I actually, frankly, am kind of shocked
18 at how well everything has gone during the expert
19 discovery. For us to have this be the first time to
20 come with you, and it's really not a particular
21 cantankerous issue.

22 Mr. Bettilyon and his team have been very
23 gracious, and I hope they feel we have, as well, of
24 trying to fit everybody's schedule. And he is exactly
25 right; both Mr. Malloy and I came back from New York. I

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1 came back sick and he regrettably came back with a giant
2 lump on his arm and had to go to the emergency room. So
3 I would be careful of New York hotels. But that is why
4 we rescheduled Dr. Robins, and I appreciate the courtesy
5 that they gave us there. But I think the parties have
6 worked quite well on this and will continue to do so.

7 Your Honor, I am giving you what's a page
8 from Dr. Gering's expert report, and as you can see,
9 Dr. -- this is page 6 from his expert report, where he
10 lists, in general form, the damages or opinions by
11 claim, and this is from his initial report, I believe.
12 And the reason I am giving you this is you can see, on
13 the right-hand side, he lists who the Pfizer expert is
14 that he is -- that coincide with his testimony on the
15 various issues. And so the damages issue, if you looked
16 at it as one pie, what this is essentially saying is
17 that Dr. Gering, Mr. Gering -- is it doctor or mister?

18 MR. BETTILYON: It's doctor.

19 MR. HATCH: Okay. Dr. Gering, he's got the
20 whole pie, Your Honor, and because of area of expertise,
21 we have actually three experts that are dealing with
22 various aspects of Dr. Gering. Now whether Dr. Gering
23 really has the ability to testify to everything he
24 purports to, may be the subject of doubter motions
25 coming up, but as of right now, he has taken on the

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1 whole pie for BYU, where as we are using three
2 witnesses. It is an extensive damage report.

3 I think Mr. Bettilyon mentioned in his brief
4 that it was full of a lot of details. He drew a
5 different conclusion than I would from that. His
6 conclusion was because there is a lot of details, it
7 should be easier for us. I think that actually gives us
8 a lot more that we need to go into. But I think the
9 fairness issue here, Your Honor, is because of the way
10 we chose to do it, they are, they are getting three days
11 of depositions for what we are getting one.

12 And, you know, I am quoting here from
13 Mr. Bettilyon's brief that he gave you today, I guess it
14 was. Right? "There is simply no reason to afford
15 Pfizer more time to depose BYU damage experts, than that
16 allows for BYU to depose Pfizer damage experts." Well,
17 they are getting three days and we are getting one day,
18 and I don't think that is fair. Particularly, you know
19 again, the damages are -- you know, that is kind of
20 where the rubber hits the road here.

21 THE COURT: On a totally practical
22 standpoint, Mr. Hatch, his deposition is scheduled for
23 Thursday, in Salt Lake City?

24 MR. HATCH: Right.

25 THE COURT: How could that be rescheduled or

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1 extended?

2 MR. HATCH: I am actually convinced that the
3 parties could work that out. The other part is he could
4 stay Thursday and Friday, if necessary.

5 MR. BETTILYON: So we are going to do it
6 while Dr. Simmons' deposition? It's just not going to
7 work, Your Honor.

8 MR. HATCH: Well, why not?

9 MR. BETTILYON: Because the people covering
10 his deposition want to be at Dan Simmons' deposition.

11 MR. HATCH: Well, I want to be at Dan
12 Simmons, too.

13 MR. BETTILYON: And, Your Honor, if I can
14 point out as well -- I will wait, I apologize.

15 MR. HATCH: We all want to be at Dan
16 Simmons' deposition. I mean, that is the case. But we
17 can certainly reschedule it. We can do it at another
18 time. You know, I mean, there are a number of things we
19 can do. But the other option is, I mean, Mr. Bettilyon,
20 I don't know if you are backing away, but he said it
21 ought to be even. If it is, then I would rather have
22 the second day with Dr. Gering, but if it's going to be
23 even, then we should each get an even number of hours.

24 THE COURT: Isn't that a decision made by
25 the party; you chose to go with one expert and they

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1 choose to go with three?

2 MR. HATCH: Right, I agree.

3 THE COURT: So that is Pfizer's choice.

4 MR. HATCH: I agree. I agree. But what I
5 am saying is they are being given 21 hours to cover the
6 same material that we have to cover in seven hours?

7 THE COURT: But Dr. Gering, and you said it,
8 is relying on the opinions of three people --

9 MR. HATCH: No, no, he is not relying on
10 them, Your Honor. Those are our witnesses.

11 THE COURT: All right.

12 MR. HATCH: We have got three. That is why
13 I said we have this pie. He has got the whole pie and
14 my guys have three of the same pie. And so if we look
15 at it, that is why I am saying he is getting -- they are
16 getting 21 hours to pound on our damage people and we
17 get seven, and I think there is a lot of stuff there.

18 I want the extra day with Dr. Gering, which
19 gives us 14 to 21, but if that is unacceptable, then we
20 ought to at least be fair, and then they ought to get
21 these same number of hours and divvy them up how they
22 choose. And I'll let them choose who and how long for
23 the same periods of time.

24 THE COURT: But it's still within the total,
25 isn't it; the confine of what you agreed to?

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1 MR. HATCH: No, Your Honor. There is no
2 total -- you are thinking back to the fact discovery
3 which is all gone and past. The experts, we have a
4 right, as do they, to depose every single expert that is
5 put forward in this case. The reason we have so many
6 depositions is because the parties put together a lot of
7 experts, but there is nothing in the scheduling order
8 that says how many experts or how many -- you are
9 limited to a number of expert opinions. You have an
10 absolute right, I think, probably a constitutional
11 right, to be able to depose each one of the experts.

12 THE COURT: All right. Mr. Hatch, what if I
13 said, what if I only hypothetically said, that you could
14 extend the Gering deposition into Friday; what would
15 your choice be?

16 MR. HATCH: Well, I've already indicated my
17 choice is to do the extra day of Gering, but it ought to
18 be an even playing field however we do it. Yeah, sure,
19 I would rather go to Simmons, but I am not going to take
20 that deposition because -- as they're not either. I
21 think Mr. Beus is taken -- is defending Dr. Gering,
22 where as I think it's Mr. Williams who is taking -- or
23 who is defending Dr. Simmons in Scottsdale. And, you
24 know, we have been accommodating them. I mean, they
25 have been doing all of their BYU witnesses in

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1 Scottsdale. I haven't raised a single stink about that.

2 THE COURT: I thought I saw something that
3 said in a deposition, there was a refusal to conduct
4 depositions in Scottsdale. I read that somewhere.

5 MR. HATCH: I don't know where because I
6 have been making a lot of trips to Scottsdale for BYU
7 witnesses, and I can travel down there. It's a little
8 bit of pain, but I want to level playing field on the
9 damages, and I prefer the extra day, but, you know, if
10 it's not going --

11 THE COURT: When did you receive the report,
12 the expert report?

13 MR. HATCH: Well, when they were due under
14 the schedule.

15 THE COURT: Okay. So why are we waiting
16 until now?

17 MR. HATCH: Well, it isn't just now. I
18 mean, we raised this a while ago. I mean, I don't know
19 where we raised it the first time. I don't know where
20 we raised it, in the context of the expert reports, but
21 I think I have raised this as a matter of discourse
22 fairly early on. I can't give you exact dates as I
23 stand here.

24 THE COURT: All right. I understand your
25 argument. Let me hear from Mr. Bettilyon.

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1 MR. BETTILYON: First, Your Honor, I do
2 deeply resent the fact that Counsel is saying he's
3 taking a lot of trips to Phoenix. I mean, we brought Ed
4 Lents, the expert he talked about, to New York so he
5 could be deposed at their convenience there. I mean,
6 we've done a lot to try to bend over backwards, and I
7 just think that is inappropriate.

8 But more importantly, Your Honor, the expert
9 report of Mr. Gering was provided to them, on February
10 18th of this year. The parties got together, after all
11 expert reports were exchanged, and we talked about
12 deposition dates. We agreed to a schedule. They agreed
13 to that schedule. They agreed to a schedule that
14 included only one day with Dr. Simmons. They agreed to
15 a schedule that included one day with Dr. Gering.

16 The truth is, if you look at the expert
17 reports, what this really is, is it's mostly
18 Mr. Hoffman, who is an expert here in town, you have
19 probably seen him before, against Mr. Gering. And these
20 other two experts, in some instances, they are wearing
21 boots and suspenders and they've decided to have an
22 additional expert provide testimony on a couple of
23 things. But if you look at this, you know, it's
24 Hoffman's name, you now, about 15, 18 times, and then
25 these other people a few times.

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1 Now, granted, we are going to take those
2 other depositions. I doubt we will spend a whole day
3 with any of those people, but that is not the issue. I
4 mean, we agreed that they could be deposed. They said
5 we could take the time. I mean, if they had a problem
6 with this, they should have raised it when we were first
7 talking about these depositions. I mean, we scheduled
8 these sometime ago and we did it knowing that the
9 schedule was going to be very complicated.

10 I will tell you, Your Honor, that Mr. Gering
11 is in town now. He is up at my office. I spoke to him
12 just before I came down. He is preparing for that
13 deposition and all the experts are scheduled this week
14 that are on financial things so they can all attend. We
15 brought Mr. Gering into Salt Lake from -- I don't know
16 where he resides but he resides somewhere on the East
17 Coast, because the other experts were here, in Salt
18 Lake. We did that to accommodate everyone and now
19 you're telling him he is going to have to appear again.
20 It just isn't going to work. There is no time.

21 And I should also add, Your Honor, that
22 Mr. Gering told me that he has a trial that starts in
23 another matter, and he does not have another day that he
24 can do this, in the month of -- what month are we
25 in? -- in October. He just does not have another day

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1 because he's got this other thing going. So I just
2 don't think this is appropriate.

3 I mean, they've got his report. They don't
4 need to ask him, frankly, even a day's worth of
5 questions. I mean, the truth is, he has four different
6 damage theories and that's it, and they kind of cover
7 the various causes of action. And his report is
8 detailed but you would expect it to be detailed. It's
9 footnoted. They can do this in the time they have
10 allotted, and I honestly don't know why they even think
11 they want more time.

12 THE COURT: All right.

13 MR. HATCH: A couple things, Your Honor; one
14 is, let's talk about time. His rebuttal reports were
15 only about a month ago, and I think within a week or
16 two, I was raising the issue. I raised it orally -- I
17 mean, by letter, about two weeks ago subsequent to that,
18 and indicated if we couldn't get an agreement, that we
19 were going to need to raise it with you. I raised it
20 timely. I didn't get a response to that letter. In
21 fact, Gering may still haven't actually responded to my
22 letter. They responded on the letter regarding
23 Dr. Simmons' testimony and the Bateman testimony but not
24 Gering.

25 THE COURT: Is there any question on behalf

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1 of your client agreements were made as to these
2 deposition dates and times?

3 MR. HATCH: Yeah, I think -- well, I mean,
4 it depends on what you mean by agreement. I don't mean
5 to be --

6 THE COURT: Well, they are scheduled. They
7 are all scheduled and scheduled close together.

8 MR. HATCH: Well, Your Honor, I mean, I hate
9 to be -- I hate to get too picky here, but that schedule
10 has been somewhat fluid. It's changed almost every
11 week, for a variety of reasons. We offered up -- for
12 instance, we offered up Dr. Mancini, I think, on
13 November 17th. That was November 10. Then his schedule
14 filled up and we had to move it again.

15 THE COURT: November 7th?

16 MR. HATCH: Was it 7th? Okay. No, no, that
17 is the third or fourth try. If I said November, I meant
18 October. Your Honor, this has been shifting around and
19 really is unfair because that schedule has changed
20 probably four or five times since I've raised this
21 issue, and I wasn't even done -- and I was not even
22 responded to.

23 I raised it with Mr. Williams, in New York,
24 two weeks ago, and asked when I'd get my response, and
25 he said, "It's going to be a while but, you know, I

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1 can't give you great hope."

2 And I said, "Well, please get me a response
3 because if it's negative, I need to raise this as soon
4 as I can with the Court."

5 And now because it took two weeks to get
6 back, and they still haven't gotten back to me, I am
7 untimely with it. I mean, that is just --

8 THE COURT: That is not the issue,
9 Mr. Hatch. The question is not one of timeliness. The
10 question is whether or not, based upon the schedule as
11 it is, whether you're entitled to additional time, based
12 upon a response.

13 MR. HATCH: What I am saying is, I am saying
14 is these -- sure, it's on that schedule. No question
15 about it. But it's on that schedule when there is a
16 dispute about how many days it's going to be. And so,
17 you know, now because he wrote it down and this is not a
18 schedule that was transmitted. This was from his own
19 firm. You can see it has different lawyers' initials on
20 it. This is something they created for the purpose of
21 putting in this brief, or maybe they use it internally.
22 That isn't something that's circulated.

23 Now because I raise something with them
24 first, instead of coming straight to the Court, they're
25 saying, "Oh, well, it goes against some agreement."

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1 Well, there is no agreement. The agreement from the
2 beginning was, I have a problem with this. We need more
3 time. And if it's not more time, if that is the
4 problem, then as a second position, and I have only, you
5 know -- I didn't put this, well, I didn't put anything
6 in the brief, I guess -- you know, then we ought to all
7 be treated the same. And that, frankly, Your Honor,
8 wouldn't change anything.

9 I think Mr. Bettilyon said he may not have
10 full questions for Mr. Hoffman and Ms. Bodston (sic)
11 that are over the next couple days, and I assume the
12 same would apply to Mr. Stevens. But if they want to
13 give equal time and split those up however they want to
14 split them, if they want to spend every minute with Rick
15 Hoffman, they are welcome to do that. They can make
16 that choice, but I am asking that we be treated equally
17 and fairly on the duty up to the time.

18 THE COURT: I will give you two additional
19 hours with Mr. Gering to be completed that day.

20 MR. HATCH: On --

21 THE COURT: On the schedule for Thursday.

22 MR. BETTILYON: Can we limit that to an
23 hour? I mean, these are seven-and-half-hour depositions
24 and we are usually going ten hours to get that done. If
25 we limit it to one hour -- I mean, I think the thing

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1 that bothers me the most about this is, the rule says
2 you get a day with an expert. If you don't want to
3 profer an expert, don't, but if you proffer him, then
4 you have to make them available for a day of deposition,
5 and we are doing that. And, if anything, Pfizer wants
6 to rewrite the rules and it's just going to get very
7 complicated. I mean, that schedule is so tight. We
8 will have to have people go back to Phoenix for
9 depositions, and so if we can just limit it to an hour,
10 that would be much appreciated.

11 THE COURT: Well, it says that Mr. Beus, and
12 you've indicated, is conducting that deposition?

13 MR. BETTILYON: Yes.

14 THE COURT: All right. And it's at your
15 office. The Dr. Simmons' deposition will be in
16 Scottsdale. Correct?

17 MR. BETTILYON: Yes.

18 THE COURT: All right.

19 MR. HATCH: Your Honor --

20 THE COURT: We are arguing about an hour
21 here.

22 MR. HATCH: Yes, and I have already checked
23 because I wanted it possible, if it was going to be
24 possible, I wanted to be able to attend Simmons'
25 deposition, and I do know there are flights in the

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1 morning that get you there -- if you are not taking the
2 deposition, you would be there probably within a half
3 hour to 45 minutes from the start of the deposition,
4 which is what I plan to do if this is how this goes. I
5 plan to stay here to finish the deposition, if it would
6 go for another day. So I think Mr. Beus could be there
7 to take that same flight, if that is all we will get,
8 and I am willing to work --

9 MR. BETTILYON: They could have raise this a
10 month ago, Your Honor.

11 MR. HATCH: I did raise it.

12 THE COURT: All right, stop. I am going to
13 give you the extra hour, Mr. Hatch, and so that parties
14 can make reasonable travel arrangements, but, you know,
15 if that is an eight- or nine- or ten-hour day, that is
16 just the way it is. All right?

17 MR. BETTILYON: All right.

18 MR. HATCH: Thank you, Your Honor.

19 THE COURT: Now let's go to the subpoenas.

20 MR. HATCH: Your Honor, on that issue --

21 THE COURT: And as I understand it, those
22 subpoenas have been issued to DNA Solutions, I think is
23 the name, in Oklahoma City, and that they are no longer
24 being called by BYU as witnesses; is that correct,
25 Mr. Bettilyon?

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1 MR. BETTILYON: That is correct, Your Honor.

2 THE COURT: Have any reports from them been
3 provided at all to Pfizer?

4 MR. BETTILYON: Yes, they received the
5 initial report and then there was a brief supplemental
6 report. And truth is, Your Honor, what's happened with
7 them is that there is a financial dispute. They sent a
8 bill for about \$450,000, and, you know, people kind of
9 gulped at that. So we decided that, you know, we want
10 experts, but some experts, we just can't afford, and
11 that is really the basis for them being withdrawn as an
12 expert.

13 THE COURT: All right. Mr. Hatch, were you
14 aware of that information?

15 MR. HATCH: I was aware that they had
16 withdrawn and there was some dispute, but it was after
17 they filed. And he is correct; I have three reports
18 that they filed in this case, and the problem with this,
19 too, is that we have got -- if Your Honor will allow me,
20 to save time, I will just give you this one. And there
21 are others, as well, but I will save time and give you
22 this one.

23 This is the expert report of Steven
24 Prescott. I think he still hasn't been deposed, I
25 believe. But if you will notice, on page 116 and 117, I

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1 have just given you a couple portions from his
2 deposition. Not only do we have their reports, but
3 their other experts, you know, are relying, he says.
4 You know 3 -- paragraph 316 is described in Simmons'
5 report. Paragraph 317, in the heading that goes over,
6 indicates that he is talking about Simmons' material.

7 And he said, "I've reviewed the report and
8 supporting material of DNA Solutions." 318, "I also
9 understand from DNA Solutions' report," so these are
10 reports that -- not only they filed three reports, but
11 they've also -- other experts relied on them.

12 MR. BETTILYON: And just a short circuit,
13 Your Honor, obviously, I mean, if somebody is relying on
14 someone that has been withdrawn, they are not going to
15 be able to rely on that. We certainly understand that.

16 MR. HATCH: Well, it's kind of a
17 card-played-card-late situation. I didn't have a whole
18 lot of time this morning, but we did -- you know, this
19 hasn't been completely briefed. They said they would
20 bring a motion to quash, and I appreciate the
21 opportunity to do it here. I pulled one case -- I
22 pulled two cases, actually.

23 If Your Honor, on page 8, and this is
24 Securities and Exchange Commission versus Koenig, which
25 is a Seventh Circuit Court of Appeals decision, in

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1 February, 2009. It indicates, "A witness identified as
2 a testimonial expert is available to either side. Such
3 a person can't be transformed after the report has been
4 disclosed and a deposition conducted to the status of a
5 trial preparation expert whose identity and views may be
6 concealed. Disclosure of the report ends the
7 opportunity to invoke confidentiality."

8 And that is also a position, I think, that
9 has been taken by the district courts, in this
10 jurisdiction, Your Honor. I will give you Giles -- I
11 think it's Colorado, yes, Giles versus Inflatable Store,
12 also from 2009. And the relevant part, if you go to
13 page 3, Your Honor, it's under analysis. It says, "TIS,
14 on the other hand, argues that Rule 26 is discovery
15 rule, and, thus, does not apply where discovery has
16 already occurred and the experts' opinions have already
17 been disclosed. I agree with TIS." And that is a
18 district court from this district.

19 I think once they -- they have raised an
20 issue of work product here, Your Honor, obviously,
21 something that's been disclosed publicly and to the
22 other side can't be work product, anymore. It doesn't
23 magically become that because you become unhappy with
24 their opinion. Plus, you know, this would work as
25 prejudice to us, as well, because we've, we have been

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1 aware for a while of the DNA Solutions' expert report,
2 and many of our experts have relied on -- have reviewed
3 those and intend to potentially rely on them and they
4 are becoming relevant of what they did as part of their
5 testimony, as well.

6 So our DNA Solutions' established facts that
7 our experts ought to be able to cite and rely on. So I
8 think it's obviously fair game that we're able to, and I
9 think it's the law in, at least, the Seventh Circuit and
10 certainly district courts in this district. Without the
11 benefit of a more blown-out motion, that is what I could
12 do for this morning.

13 THE COURT: All right. Mr. Bettilyon?

14 MR. BETTILYON: Yes, Your Honor, I did cite
15 a case that says you could withdraw an expert anytime up
16 until the time he is put on an expert -- you know, on a
17 list of witnesses which hasn't yet happened in this
18 case.

19 More to the point, Your Honor, first of all,
20 Mr. Hatch mentions that his experts rely on DNA
21 Solutions. I don't recall any statement, in any of his
22 expert reports, that call that out. Maybe he can point
23 specifically what they are relying on.

24 MR. HATCH: I may have used that word
25 improperly.

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1 MR. BETTILYON: More importantly, Your
2 Honor, even if they are a testifying expert, the rules
3 that apply to this case and the Federal Rules of Civil
4 Procedure, as amended, don't allow them to get into this
5 discovery. Now what DNA Solutions did, primarily, Your
6 Honor, if not I think almost exclusively, they did
7 biological tests on the biological samples that were
8 produced by Pfizer, not by BYU.

9 And as the Court will recall, in fact, I
10 came down, you know, several month ago, and said, "Could
11 we maybe get some more of those samples," because we
12 didn't think we received all the samples that we were
13 entitled to. But now, I have a hard time understanding,
14 and that is one of the things they are asking for, you
15 know, their own biological samples.

16 Well, you know, their own biological
17 samples, they've had those since the beginning of the
18 case and they can test them. But there are really three
19 reasons why --

20 MR. HATCH: Can I clarify something? We are
21 not asking for biological samples.

22 THE COURT: That's what I thought, as well.

23 MR. BETTILYON: Well, they want the test
24 results for the biological samples.

25 THE COURT: Right.

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1 MR. BETTILYON: But the test results, they
2 can get those themselves, and my understanding is they
3 have retained experts that could test biological
4 samples. I don't know if they've actually issued any
5 reports, but I do recall that they did, on their initial
6 list of experts, have experts that could do testing on
7 biological samples. They could do that inhouse. I
8 imagine they tested these inhouse, as well.

9 Here really is the bottom line: In this
10 case, we have a stipulation that says that the only
11 thing you get are expert reports and what they relied
12 on. Well, they are not going to testify at trial, so
13 there's nothing they are going to rely on. There is
14 going to be no testimony at trial. So I don't see how
15 they can do discovery, given that stipulation that is
16 found in the report, because there isn't anything going
17 to be anything to rely on at trial. No testimony is
18 going to be proffered at trial.

19 Second, Your Honor, really what they are
20 asking for is what would amount to fact discovery
21 because that would amount to test results that could
22 have been done -- any of that, they could have been done
23 any of that in fact discovery. They could have obtained
24 samples or results or anything they wanted to and it's
25 really just an effort to try and get around fact

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1 discovery.

2 And I think most importantly, Your Honor,
3 the samples that we have them test as opposed to samples
4 that we don't have them test, that really is work
5 product. And even under with the testifying expert, you
6 don't get into work product unless it's part of
7 something that they relied on. And since they are not
8 testifying at trial, there's nothing for them to rely
9 on. I just think that this is a nonissue.

10 We have had a financial dispute with this
11 expert, and as a consequence, we have had to withdraw
12 them as experts. But we are really getting into, again,
13 a great deal of expert discovery. They've also known
14 for sometime that we withdrew them. I don't have the
15 exact date, but it's certainly been several months since
16 we withdraw them and we let them know. I think it was
17 sometime in June, or July, when they were withdraw.

18 And, again, they wait until now at the
19 conclusion of expert discovery and we have so much going
20 on. And I don't see how they can use this information,
21 or what use it will be, because we have said, with all
22 experts, all you get from any expert is their expert
23 report and the test -- and any documents they've relied
24 on. And since these experts don't intend to testify at
25 trial, there are no documents they will rely on.

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1 There's nothing that will go into trial so there's
2 really no prejudice at all to them by saying that. I
3 mean, I just think as an extension of stipulation we
4 have had in place from the beginning, it would be
5 improper to go forward with this discovery.

6 THE COURT: Mr. Hatch?

7 MR. HATCH: A couple of things; one is this
8 motion isn't regarding whether or not their testimony
9 will be admissible at trial. I think that's going to be
10 a decision that Judge Stewart would make, and I think
11 that Mr. Bettilyon's treating that as a forgone
12 conclusion, and I think it's anything but that.

13 I've tried cases in this district where an
14 expert gave testimony that was not acceptable, the party
15 had my client, before I represented them, and that
16 witness became, as a lot of these cases read, became a
17 witness for the other side. This is a very -- this is
18 an instance where DNA Solutions concurred, apparently,
19 with Dr. Mancini's findings. It's relevant to the case.
20 It's discoverable. And I think because they don't like
21 the testimony, they create a financial dispute because
22 they don't like the testimony, but that doesn't get them
23 out of it.

24 THE COURT: I am not going to go into the
25 reasons. I accept what Mr. Bettilyon says, in that

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1 regard, in good faith. Let's just talk about the law.

2 MR. HATCH: Okay. Well, based on the law, I
3 think we are -- I think based on the cases I have shown
4 you, in the fact that they can't claim a work product to
5 something that has already been put out and that they
6 disclosed to us, in three different expert reports. I
7 think that kind of ends the matter for that decision.

8 At that point, there isn't any
9 confidentiality left. The work product vanished the
10 second they issued the report. So I think we are
11 entitled to this. I think whether it's admissible at
12 trial will probably be a subject to a Motion in Limine,
13 if Mr. Bettilyon wants to bring that and have Judge
14 Stewart decide that before trial.

15 But as of right now, they've fought for, in
16 this court, to be able to see the biologic materials of
17 Monsanto. They've tested them. They've issued reports
18 and we have -- since they have been submitted in this
19 case, we have every right to test those and rely -- test
20 their conclusions and rely upon them if we choose to.

21 MR. BETTILYON: Your Honor, if I can -- I'm
22 sorry if he is not done yet.

23 THE COURT: Are you finished?

24 MR. HATCH: I think I am.

25 THE COURT: Okay. Mr. Bettilyon?

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1 MR. BETTILYON: If I can just walk through
2 this logically, we've withdrawn their expert report.
3 They are not having to show up, in Salt Lake, to testify
4 during the trial. They don't reside in the State of
5 Utah. No party can serve a subpoena, a trial subpoena,
6 for them to come testify. So at trial, unless somebody
7 allows a deposition to occur now, there will be no
8 testimony on which any expert opinions can be formed.

9 Even if there were, under the rules that we
10 have agreed to in this case, the only things that would
11 be produced would be their expert opinions and the
12 documents they relied on in forming their expert
13 opinions.

14 THE COURT: Which have already been
15 provided?

16 MR. BETTILYON: We provided their -- expert
17 reports, we provided the documents upon which they
18 relied, yes. So there isn't really anything that's
19 really discoverable, even if you go back and allow these
20 depositions, and it's just not proper. The rules talk
21 about how -- I mean, we believe that we can also
22 transfer these people into nontestifying experts. We
23 have a case that supports that.

24 And the Rules of Civil Procedure say that if
25 it's a nontestifying expert, then you have to show a

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1 very heightened burden to be able to do that discovery,
2 and they clearly can't meet that heightened burden. And
3 so I think it's fair to say that we withdraw them long
4 before now, long before the conclusion of expert
5 discovery. Their depositions haven't been taken. Even
6 Mr. Hatch's cases, in re, talk about, you know, where an
7 expert's deposition has been taken. They just haven't
8 been taken.

9 I just don't think, in the context of what
10 we have going on here, it makes any sense to go do this
11 discovery; especially when, again, they were withdrawn
12 many months ago and could have brought this motion up,
13 if they wanted to, you know, in June or July or August,
14 instead of now, when we have 20 depositions scheduled in
15 the next 21 days.

16 So for all of those reasons, we just say,
17 you know, enough is enough. Let's get done, and let's
18 go try this case, and nothing more should happen.

19 THE COURT: Mr. Hatch, one more?

20 MR. HATCH: Just quickly; on the timely
21 issue, this is an issue that came in the very, very
22 beginning of setting up the depositions, so I think,
23 again, that is an over -- and I think Mr. Bettilyon kind
24 of proves my point.

25 Prejudice, I think we are entitled to it by

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1 the cases. Once they put themselves out there, they are
2 a witness. And we -- and I think that is what the
3 Seventh Circuit and the District of Colorado recognized,
4 and I think that he's shown prejudice to us is we have
5 had to do this by a subpoena, and they are outside, you
6 know, the subpoena power for trial.

7 So the only way we get this testimony, I
8 believe is he is right, is by deposition. And since we
9 are entitled to that, I think we have the ability to go
10 do that. We can also, presumably, I don't know if
11 anybody has even tried to do this, get them to come
12 voluntarily, but I think we have the right to take that
13 deposition and preserve that testimony for trial.

14 It isn't enough in this, and Mr. Bettilyon
15 points out that the prejudice isn't enough to just show
16 the expert reports and documents they relied on at
17 trial. We need testimony. And I think the issue he is
18 arguing on that point is something that should be left
19 for Motion in Limine with Judge Stewart.

20 THE COURT: I will give this one to you,
21 Mr. Hatch, and allow those to be served, if possible.
22 And, Mr. Bettilyon, you can raise the issue in a Motion
23 in Limine before Judge Stewart. I don't know that you
24 are going to gain anything. Is there anything else?

25 MR. HATCH: I think that addressed it.

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1 MR. BETTILYON: That is it, Your Honor.

2 THE COURT: I want to say this: I
3 appreciate the very hard work that has been undertaken
4 by both sides, in this very long and somewhat
5 necessarily contentious case, so thank you.

6 MR. HATCH: I think, Your Honor, if this was
7 it, what we have had after two months of, what was it?
8 About 32 expert depositions or something like that, I
9 think we have done pretty well. I just hopefully --

10 THE COURT: You just need to get to trial.

11 MR. HATCH: We will get there.

12 THE COURT: All right. We will be in
13 recess.

14 (The hearing was concluded at 4:30 p.m.)
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REPORTER'S CERTIFICATE

State of Utah)
)
County of Salt Lake)

I, Kellie Peterson, Certified Shorthand Reporter,
Registered Professional Reporter, and Notary Public for
the State of Utah, do hereby certify:

THAT the foregoing proceedings were taken before
me at the time and place set forth herein; that the
witness was duly sworn to tell the truth, the whole
truth, and nothing but the truth; and that the
proceedings were taken down by me in shorthand and
thereafter transcribed into typewriting under my
direction and supervision;

THAT the foregoing pages contain a true and
correct transcription of my said shorthand notes so
taken.

IN WITNESS WHEREOF, I have subscribed my name and
affixed my seal this 8th day of October, 2011.

Kellie Peterson, RPR
Notary Public

My commission expires:
December 29, 2012